BRB No. 07-0757 BLA

E.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARIS MEADOWS COAL COMPANY	)	DATE ISSUED: 06/30/2008
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Granting Benefits of Alan L. Bergstrom, Administrative Law Judge United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Law Judges.

PER CURIAM:

Employer appeals the Decision and Order-Granting Benefits (06-BLA-5456) of Administrative Law Judge Alan L. Bergstrom (the administrative law judge) on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] After finding that the subsequent claim was timely filed, the administrative law judge found that the new x-ray and medical opinion evidence established pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and that claimant had, therefore, established a change in a condition of entitlement previously adjudicated against him pursuant to 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's subsequent claim on the merits. After crediting claimant with sixteen years of coal mine employment, and finding that pneumoconiosis was established at 20 C.F.R. §718.202(a)(1), (4) on the merits, the administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b) and that the presumption was unrebutted. The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) on the merits, and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) on the merits. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(1), (4) and 718.204(c). Claimant has not responded. The Director, Office of Workers' Compensation Programs (the Director), filing a limited response, argues that the administrative law judge properly found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The Director does not, however, address the administrative law judge's

[1] Claimant initially filed a claim for benefits on February 13, 1991. Director's Exhibit 1. On June 2, 1994 Administrative Law Judge David W. DiNardi denied the claim because claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. *Id*. Pursuant to a *pro se* appeal by claimant, the Board affirmed the denial of benefits because claimed failied to establish the existence of pneumoconiosis. *Id.*; [*E.M.*] *v. Paris Meadows Coal Co.*, BRB No. 94-2089 BLA (April 24, 1995)(unpub.). Claimant took no further action until he filed a second claim on March 30, 1998. Director's Exhibit 2. On June 15, 2001 Administrative Law Judge Jeffrey Tureck denied benefits on this claim, finding that the newly submitted evidence failed to establish the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant. *Id*. Claimant took no further action, until he filed a third claim on August 30, 2004. Director's Exhibit 4. After a proposed award of benefits on this claim by the district director, employer requested a hearing. Subsequent to the hearing, the administrative law judge issued the Decision and Order awarding benefits on this subsequent claim from which employer now appeals.

findings on the merits. In reply, employer reiterates the contentions raised in its initial brief. [2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits, claimant must establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a); that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203; that he is totally disabled at 20 C.F.R. §718.204(b); and that pneumoconiosis was a substantially contributing cause of his total disability at 20 C.F.R. §718.204(c). *See* 20 C.F.R. §725.202(d).

If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's last claim was denied because he failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing pneumoconiosis in order to proceed with this claim. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding as well as his findings that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that claimant was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant was employed in the coal mine industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

20 C.F.R. §725.309

Initially, employer contends that administrative law judge erred in finding that the newly submitted evidence established the existence of pneumoconiosis at Section 718.202(a)(1) and (4) and, therefore, erred in finding a change in an applicable condition of entitlement established at Section 725.309. Specifically, employer contends that the newly submitted medical opinion of Dr. Rasmussen, finding pneumoconiosis, Director's Exhibit 13, and the newly submitted positive x-ray interpretations of pneumoconiosis by Drs. Patel and DePonte, Director's Exhibit 13; Claimant's Exhibit 6, were insufficient to establish a change in an applicable condition of entitlement as previous opinions of Dr. Rasmussen, diagnosing pneumoconiosis, Director's Exhibits 1, 2, and previous positive x-ray interpretations by Drs. Patel and DePonte, *id.*, had been found to have been insufficient to establish the existence of pneumoconiosis in prior claims. Employer asserts that, in order to establish a change in a condition of entitlement pursuant to Section 725.309, claimant must submit new evidence demonstrating that "his condition has actually changed." Thus, employer contends that because the new medical evidence relied upon by the administrative law judge to support a finding of pneumoconiosis in this subsequent claim merely constitutes a repetition of evidence previously submitted, but rejected in prior claims, it is insufficient to establish a change in an applicable condition of entitlement at Section 725.309. Employer's Brief at 11. Employer further argues that the administrative law judge erred in finding pneumoconiosis established based on this new evidence without first considering whether the new evidence established that claimant's particular kind of pneumoconiosis, if any, was latent and progressive. Employer contends that the new evidence fails to do this because Dr. Rasmussen's new opinion is merely a restatement of his prior opinions that claimant suffered from pneumoconiosis.

Contrary to employer's assertion, the administrative law judge is only required to consider the *new* evidence to determine whether that evidence establishes a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*); *White* 23 BLR at 1-3. Here, the mere fact that Dr. Rasmussen's previous diagnosis of pneumoconiosis in an earlier claim was rejected, *see* Director's Exhibit 2, does not preclude the administrative law judge from crediting his new opinion diagnosing the disease, which was based on a new examination and new testing.[4] *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir.

[4] Dr. Rasmussen's new medical opinion was based on an examination, x-ray and testing conducted in November of 2004. Based on the findings on examination, x-ray, and testing, Dr. Rasmussen concluded that claimant suffered from pneumoconiosis arising out of coal dust exposure and chronic obstructive pulmonary disease and emphysema caused by coal dust exposure and cigarette smoking. Director's Exhibit 13.

2006); *see also Rutter*, 86 F.3d at 1364-1365, 20 BLR at 2-240. Further, contrary to employer's assertion, "a miner is not required to separately prove that he [or she] suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that the disease actually progressed." *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-26 (2004) (*recon. en banc*). Rather, "[b]ecause the potential for progressivity and latency is inherent in every case, a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a progressive nature." *Workman*, 23 BLR at 1-26-27. The administrative law judge was not, therefore, required to separately determine whether claimant's particular kind of pneumoconiosis was progressive and latent in order to find that it was established by the new evidence. Thus, contrary to employer's arguments, the administrative law judge could rely on the new opinion of Dr. Rasmussen and the new positive x-ray interpretations to support a finding of a change in an applicable condition of entitlement at Section 725.309(d).

Employer also contends that the administrative law judge erred in finding a change in an applicable condition of entitlement established at Section 725.309 by finding that pneumoconiosis was established based on the newly submitted x-ray evidence at Section 718.202(a)(1). The administrative law judge noted that six interpretations of three x-rays were submitted with the current claim.[5] The administrative law judge concluded that three of the positive interpretations were by physicians who were dually qualified.[6] The

[5] The new x-ray evidence consisted of: the positive reading of a November 3, 2004 x-ray by Dr. Patel, a B reader and Board-certified radiologist, Director's Exhibit 13; the positive reading of the same x-ray by Dr. Alexander, also a B reader and Board-certified radiologist, Director's Exhibit 18; the negative reading of the same ray by Dr. Wheeler, a B reader and Board-certified radiologist, Director's Exhibit 16; the negative reading of the July 20, 2005 x-ray by Dr. Castle, a B reader; the positive reading of the July 1, 2006 by Dr. DePonte, a B reader and Board-certified radiologist, Claimant's Exhibit 1; and the negative reading of the same x-ray by Dr. Scatarige, also a B reader and Board-certified radiologist, Employer's Exhibit 5.

[6] A dually-qualified reader is both a B reader and Board-certified radiologist. A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified

administrative law judge noted that the fact that dually qualified physicians made identical findings regarding the type, level of progression, and location of the opacities on two different x-rays was particularly compelling. Decision and Order at 48. Accordingly, the administrative law judge permissibly concluded that the preponderance of the new x-ray evidence was positive, established the existence of pneumoconiosis at Section 718.202(a)(1), and was, therefore, sufficient to establish a change in an applicable condition of entitlement at Section 725.309.[7] 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Employer next asserts that the administrative law judge erred in finding that the new medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4), thereby establishing a change in an applicable condition of entitlement. Employer contends that the administrative law judge erred in crediting the opinion of Dr. Rasmussen over the opinions of Drs. Fino and Clark on the issue. Although the administrative law judge found that all three physicians' opinions were well-documented, he permissibly credited the opinion of Dr. Rasmussen, who found that claimant had pneumoconiosis, over the contrary opinions of Drs. Castle and Fino, because he found it more consistent with the new x-ray evidence showing the existence of pneumoconiosis. In addition, the administrative law judge permissibly credited Dr. Rasmussen's opinion and because it was consistent with the diagnosis of pneumoconiosis made by claimant's treating physician, which was contained in claimant's treatment records and reviewed by Dr. Rasmussen.[8] Further, contrary to employer's contention, the administrative law judge did not err in crediting the opinion of Dr. Rasmussen over the opinions of Drs. Castle and Fino because he was not as well-qualified. The administrative law judge noted that all three physicians were Board-certified in internal medicine, while only Drs.

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radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

[7] Further, contrary to employer's argument, the totality of the administrative law judge's Decision and Order shows that he did not rely on Dr. Castle's x-ray reading of 0/1 to find pneumoconiosis, but accurately found and relied on the fact that there were three positive readings by three dually-qualified readers. Decision and Order at 6-7, 48; Director's Exhibits 13, 18; Claimant's Exhibit 1.

[8] Dr. Bell treated claimant at the Craig Family Medicine Clinic and opined that claimant suffered frim pneumoconiosis. Director's Exhibit 17. Dr. Forehand's extensive treatment notes document a history of coal workers' pneumoconiosis. Director's Exhibit 19; Claimant's Exhibit 2. Dr. Freeman opined that claimant suffered from black lung disease. Claimant's Exhibits 2, 3.

Castle and Fino were Board-certified in the subspecialty of pulmonary disease. Notwithstanding this fact, however, the administrative law judge permissibly credited Dr. Rasmussen's opinion because he had more extensive and relevant experience involving the treatment of miners.[9] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In addition, to the extent that Drs. Castle and Fino relied on the new x-ray evidence as support for their findings that claimant did not suffer from pneumoconiosis, the administrative law judge found that their opinions were contrary to his own finding that the new x-ray evidence established the existence of the disease. Further, the administrative law judge noted that the opinions of Drs. Castle and Fino, regarding pneumoconiosis, were not as credible as Dr. Rasmussen's opinion because their opinions were based, in part, on the numerical superiority of all negative x-ray evidence of record, which spanned a twenty-year period, without sufficiently considering the shift toward positive readings over time by better qualified readers. *See Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985). Further, the administrative law judge noted that the new opinions of Drs. Castle and Fino based, in part, on their review of claimant's treatment records, conflicted with the opinions diagnosing pneumoconiosis contained in those records. Decision and Order at 50. Accordingly, we affirm the administrative law judge's finding that the new medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4). We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence supports a finding of a change in an applicable

[9] The administrative law judge noted that Dr. Rasmussen has held, among other positions, the positions of Chief Medical Officer of the Appalachian Coal Mining Research Coal Unit, Chief of the Pulmonary Section of the Appalachian Regional Hospital, and Director of the Appalachian Pulmonary Laboratory. In addition, the administrative law judge noted that Dr. Rasmussen has published several papers and articles on coal workers' pneumoconiosis and related topics. Decision and Order at 10.

Further, we note that even if the administrative law judge erred in according greater weight to the opinion of Dr. Rasmussen based on credentials, the administrative law judge has provided an independently affirmable basis for crediting the opinion of Dr. Rasmussen over the contrary opinions of Drs. Castle and Fino, *i.e.*, that Dr. Rasmussen's opinion is best supported by the underlying documentation. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n. 4 (1983); *see also Larioni v. Director, OWCP*,, 6 BLR 1-1276 (1985).

condition of entitlement at Section 725.309, based on the weight of the new medical opinion evidence at Section 718.202(a)(4).

In conclusion, we affirm the administrative law judge's finding that the newly submitted x-ray evidence and the newly submitted medical opinion evidence, when considered together, established the existence of pneumoconiosis at Section 718.202(a), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and a change in an applicable condition of entitlement at Section 725.309(d).

20 C.F.R. §718.202(a)

Employer next argues, on the merits, that the administrative law judge erred in relying on the new x-ray evidence and medical opinion evidence to find pneumoconiosis established at Section 718.202(a), without sufficiently weighing the earlier x-ray evidence, which was overwhelmingly negative, and the medical opinion evidence on the issue. We disagree.

Contrary to employer's argument, the administrative law judge considered all of the x-ray and medical opinion evidence of record, which spanned "a period of more than two decades" Decision and Order at 53, and permissibly gave controlling weight to the new evidence submitted in support of the subsequent claim, which established the existence of pneumoconiosis, as it "most accurately reflect[ed] [c]laimant's current condition.[10] Decision and Order at 53; *see Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman*, 23 BLR at 1-27. Accordingly, we affirm the administrative law judge's finding that the existence of pneumoconiosis was established at Section 718.202(a), on the merits.

20 C.F.R. §718.204(c)

Employer next argues that the administrative law judge erred in finding that claimant established that his totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(c). Specifically, employer argues that there is no credible evidence that pneumoconiosis caused claimant's totally disabling respiratory impairment. Employer notes that even though both Drs. Fino and Castle found that claimant did not have pneumoconiosis, they nonetheless opined that, assuming

[10] The administrative law judge specifically noted that the evidence in claimant's first 1991 claim predated the evidence submitted with the 2004 subsequent claim by ten or more years, while the evidence submitted in connection with claimant's second 1998 claim predated the evidence in the subsequent claim by more than three years. Decision and Order at 53.

that claimant had pneumoconiosis, the disease could not have caused claimant's totally disabling respiratory impairment. Thus, employer argues that it was irrational for the administrative law judge to discredit their opinions merely because they did not diagnose pneumoconiosis. Employer further argues that the administrative law judge failed to provide a valid basis for concluding that Dr. Rasmussen's opinion supported a finding of disability causation, as he failed to offer a reasoned medical judgment that pneumoconiosis, as opposed to cigarette smoking, was the cause of claimant's totally disabling respiratory impairment. In addition, employer argues that the administrative law judge erred in relying on an earlier opinion by Dr. Robinette, as supportive of a finding that claimant's disability was due to pneumoconiosis, without sufficiently considering all of the old evidence, especially when Dr. Robinette's opinion had been rejected by a previous administrative law judge. Employer's Brief at 34.

The regulation at Section 718.204(c) states that a miner shall be considered totally disabled due to pneumoconiosis, if pneumoconiosis, as defined by the Act, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a substantially contributing cause if it has a material adverse effect on the miner's respiratory or pulmonary condition or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii); *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Claimant must demonstrate that pneumoconiosis is a necessary condition of disability; it must play more than a *de minimis* role in claimant's disabling respiratory impairment. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003).

Contrary to employer's argument, the administrative law judge may accord less weight to medical reports regarding the cause of claimant's total disability if the physicians did not, contrary to his own finding, diagnose the presence of pneumoconiosis or a disabling respiratory impairment. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-374 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Thus, the administrative law judge permissibly accorded less weight to the causation opinions of Drs. Fino and Castle based on their failure to diagnose the existence of pneumoconiosis. Notwithstanding the physicians' "assumption" of the existence of the disease, the administrative law judge permissibly found the credibility of their opinions on disability causation undermined by their findings that claimant did not have pneumoconiosis, a finding contrary to the administrative law judge's finding. *See generally Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

Rather, in finding that claimant established disability causation at Section 718.204(c), the administrative law judge accorded dispositive weight to the opinion of Dr. Rasmussen, who opined, based on a thorough examination of claimant and thorough review of evidence of record, including claimant's employment, smoking and medical histories as well as objective medical tests, that coal mine dust exposure was a "major" contributing factor in the miner's totally disabling lung disease. Director's Exhibit 13; Decision and Order at 11, 60. Contrary to employer's assertion, such a finding is sufficient to support a finding of disability causation at Section 718.204(c). 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross*, 23 BLR at 1-18; *Trumbo v. Reading Anthracite Co.*, 17 BLR at 1-90 (1993). Further, contrary to employer's argument, the administrative law judge considered all of the medical opinion evidence of record and rationally rejected the earlier opinions or accorded them little weight because they either did not find claimant to be totally disabled or they were so old as to render their credibility on claimant's current condition faulty. *See Hicks*, 138 F.3d at 536; 21 BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-224; *see generally Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). The administrative law judge properly accorded some weight to the causation opinion of Dr. Robinette because the doctor opined that claimant was totally disabled. Therefore, the administrative law judge considered all of the medical opinion evidence on the issue of disability causation and permissibly found that it established this element. We affirm the administrative law judge's finding pursuant to Section 718.204(c). 20 C.F.R. §718.204(c)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order-Granting Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge